

BEFORE THE UNITED STATES FEDERAL TRADE COMMISSION

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THE HUMANE SOCIETY OF THE UNITED STATES,  
Petitioner,

NATIONAL PASTEURIZED EGGS, INC,  
dba DAVIDSON'S SAFEST CHOICE,  
Proposed Respondent.

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**COMPLAINT FOR ACTION TO STOP  
FALSE OR DECEPTIVE ADVERTISING**

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## INTRODUCTION

Pursuant to Sections 2.1 and 2.2 of the Federal Trade Commission (“FTC”) regulations, 16 C.F.R. §§ 2.1 & 2.2, Complainant The Humane Society of the United States (“HSUS”) hereby requests that the Commission investigate and commence an enforcement action against National Pasteurized Eggs, Inc. dba Davidson’s Safest Choice (“Davidson’s Safest Choice”), for engaging in false or misleading advertising in violation of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.* (“FTC Act”).

As described below, Davidson’s Safest Choice has issued, and/or is continuing to issue, unlawfully false and/or misleading representations about the treatment of animals used to produce its products. Text and imagery on certain shell egg cartons sold under the company’s label, accompanied by similar representations made on the company’s website and in its magazine advertising, indicate that these eggs were produced under conditions where hens have the ability to roam freely on outdoor pastures. This is patently untrue.

In fact, as detailed further below, practices used by Davidson’s Safest Choice egg suppliers fall far below both the level of care represented and reasonable consumer expectations based on the label and advertising. In particular, the “battery cage” conditions employed by Davidson’s Safest Choice suppliers are starkly at odds with the images of free-roaming hens and large, sunny pastures that the company prominently displays on its cartons and webpage, as well as the company’s written promises that its eggs are “Farm-Fresh,” and that its egg pasteurization “eliminates the risk of avian flu viruses.” Consequently, consumers buying Davidson’s Safest Choice eggs—in particular, the All-Natural variety—are not getting what they paid for: eggs produced by bucolic farms under safe and humane conditions. Instead,

consumers receive eggs from the intense indoor confinement cages of industrialized production. Davidson's Safest Choice is deceiving consumers concerned about the suffering of animals with false assurances of the animals' living conditions. This deceptive conduct harms consumers and competitors alike, while compromising the market's responsiveness to the animal welfare concerns of consumers more broadly.

Notably, the representations at issue here are substantially similar to representations at issue in a previous complaint from HSUS from about one year ago, concerning Hillandale Farms' "Nearby Eggs" brand. That brand also employed similar images of pastured hens on its cartons and promised "farm fresh" eggs.<sup>1</sup>

Unfortunately, this kind of misbranding is likely to persist in the egg production industry unless regulators remain vigilant. Agency intervention is needed to stop Davidson's Safest Choice from continuing to exploit consumer concern for animal welfare. Consumers on their own cannot determine that they have been deceived about the level of animal care provided, because consumers do not have access to the producer's production facilities and production practices are not readily apparent in the final product. Accordingly, HSUS respectfully requests that the Commission take prompt action to stop Davidson's Safest Choice from deceiving consumers with false claims of animal care.

## **PARTIES**

### **A. The Humane Society of the United States**

HSUS is the nation's largest animal protection organization with millions of

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<sup>1</sup> HSUS FTC Complaint (June 29, 2015); Letter from Mary K. Engle, Associate Director, Division of Advertising Practices, FTC, to Rebecca Cary, Esq., HSUS, re: Complaint Regarding Hillandale Farms, Inc.'s Advertising for Nearby Eggs (Nov. 2, 2015) (Attachment A).

members and constituents. HSUS is based in Washington, DC, and works to protect all animals through education, investigation, litigation, legislation, advocacy, and field work. HSUS campaigns to eliminate the most egregious factory farming practices, including the intensive confinement of egg-laying hens in battery cages so cramped that they cannot even fully spread their wings. HSUS's headquarters are located at 700 Professional Drive, Gaithersburg, MD 20879.

**B. National Pasteurized Eggs, Inc. dba Davidson's Safest Choice**

National Pasteurized Eggs, Inc. dba Davidson's Safest Choice is an Illinois corporation that processes and markets eggs, with facilities in Illinois, South Dakota, Iowa, and Singapore. The company markets these eggs throughout the United States, including Washington, DC, at retailers such as Harris Teeter, Shoprite, Big Y, and other major grocery outlets. National Pasteurized Eggs, Inc.'s corporate headquarters are located at 2963 Bernice Road, Lansing, Illinois 60438.

**STANDARD OF REVIEW**

Under Section 5 of the FTC Act, unlawful deception will be found "if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."<sup>2</sup> A representation is thus unlawfully deceptive if it is (1) material to a consumer's decision-making; and (2) likely to mislead the consumer.<sup>3</sup> To determine if an advertisement is deceptive, marketers must identify all express and implied claims that the advertisement

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<sup>2</sup> FTC, Policy Statement on Deception, *appended to Cliffdale Assocs., Inc.*, 103 FTC 110, 174 (1984), *available at* [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf) (last visited Mar. 21, 2016)) (hereinafter "Policy Statement on Deception"); *see* 15 U.S.C. § 45.

<sup>3</sup> *Id.*

reasonably conveys. Marketers must ensure that all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis before they make the claims.<sup>4</sup> If a particular consumer group is targeted, or likely to be affected by the advertisement, the advertisement should be examined from the perspective of a reasonable member of that group.<sup>5</sup> Moreover, the advertisement should be evaluated as a whole, including its visual elements, to account for “crafty advertisers whose deceptive messages were conveyed by means other than, or in addition to, spoken words.”<sup>6</sup>

## **FALSE OR MISLEADING CLAIMS**

### **A. Representations at Issue.**

At issue in this petition are representations made on certain Davidson’s Safest Choice egg cartons and on its website, in the form of attention-grabbing text and imagery regarding the treatment of hens. These representations target consumers concerned with animal suffering and impart messages that its eggs are produced by free-range hens with access to the outdoors. Such representations are unlawfully deceptive. In reality, its eggs are produced in battery cages—a production method in which hens never see the light of day, and live in horrible conditions.<sup>7</sup>

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<sup>4</sup> See 16 C.F.R. § 260.2 (citing FTC Policy Statement Regarding Advertising Substantiation, 104 FTC 839 (1984) (hereinafter “FTC Policy Statement Regarding Advertising Substantiation”).

<sup>5</sup> FTC, Policy Statement Regarding Advertising Substantiation, 104 FTC 839 (1984), *available at* <https://www.ftc.gov/public-statements/1983/03/ftc-policy-statement-regarding-advertising-substantiation>.

<sup>6</sup> Policy Statement on Deception, *supra* note 2 (citing *Am. Home Products Corp. v. FTC*, 695 F.2d 681, 688 (3d Cir. 1982)).

<sup>7</sup> The company also markets a separate line of eggs advertised and labeled as cage-free eggs, which is not the subject of this Complaint.

## **1. The egg carton.**

The entire front of the Davidson's Safest Choice carton prominently features a picture of a bucolic farm scene. *See* Attachment B (carton labeling). On some cartons found on sale in grocery stores, as well as on cartons depicted on the company's webpage, this imagery is of sunny, rolling, and verdant pastures, with a traditional red wooden barn in the background and silhouettes of roaming hens in the foreground. The hens in this image have fully intact beaks that have not been "trimmed" as they typically are in battery cage systems. Framing the images on each carton, the label declares in large block letters, "all-natural," and "Farm Fresh Taste."

Given the proximity of these "fresh" and "local" claims to the image of a small, traditional family farm with lush grass, the obvious implication is that these eggs are produced on farms with pastures that give hens access to sunlight and space to roam, and through production methods that do not amputate the hens' beaks. But this is not true.<sup>8</sup>

## **2. The company website.**

Additional misleading animal welfare representations are on the company's website. *See* Attachment C (Davidson's Safest Choice website). First, the pictorial background for all of the webpages on the Davidson's Safest Choice website includes the same open, rolling pastures and traditional red barn that are displayed on the egg

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<sup>8</sup> Davidson's Safest Choice has previously been the subject of concerns regarding misleading imagery on its carton. In a 2006 rulemaking petition asking the Food and Drug Administration to change its egg labeling requirements, Compassion Over Killing ("COK") described the Davidson's Safest Choice carton at the time: "Davidson's egg container depicts a hen sitting on a nest with eggs and a sunny field in the background. This imagery suggests free roaming hens with the opportunity to nest and be outside. Yet, evidence suggests that these are conventionally cage-confined animals." Attachment D (COK 2006 Rulemaking Petition, Dkt. No. FDA-2006-P-00394, at 12 & n.40). The company has since slightly changed its carton imagery, but, as described in this Complaint, the imagery remains misleading.

carton; the website background also includes eggs and an egg carton sitting in the pasture grass.

Second, the text supports the impression that the hens producing the eggs have wide space to roam. Under its home webpage, the company prominently asserts that its products have a “Farm-Fresh Flavor.”<sup>9</sup> The company also implies that all of its eggs come from cage free suppliers. On the webpage that describes the eggs that Davidson’s Safest Choice sells, the company states:

Safest Choice Pasteurized Eggs are available in two varieties, All-Natural and Cage Free. *For both varieties*, Safest Choice only sources eggs from vegetarian-fed hens that are hormone and antibiotic free. Safest Choice eggs come from USDA certified and inspected farms that are Kosher certified by the Orthodox Union. Safest Choice uses fresh Cage Free eggs from farms approved as Certified Humane.<sup>10</sup>

The implication is that all “Safest Choice” eggs are from “vegetarian-fed hens,” “come from USDA certified and inspected farms that are Kosher certified,” and “use[ ] Cage Free eggs from farms approved as Certified Humane.” In addition, on its Frequently Asked Questions webpage, Davidson’s Safest Choice includes the question, “Are your hens cage free?” The company answers by first deflecting the question, and, second, misleadingly explaining that the “housing system” for its hens “adheres to the *strict guidelines* of the United Egg Producer Animal Welfare Plan.”<sup>11</sup>

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<sup>9</sup> DAVIDSON’S SAFEST CHOICE, <http://www.safeeggs.com> (last visited Sept. 19, 2016).

<sup>10</sup> DAVIDSON’S SAFEST CHOICE, *Safest Choice Pasteurized Eggs*, <http://www.safeeggs.com/safest-choice-pasteurized-eggs/pasteurized-eggs> (last visited Sept. 19, 2016) (emphasis added).

<sup>11</sup> DAVIDSON’S SAFEST CHOICE, *Safest Choice Pasteurized Eggs FAQ*, <http://www.safeeggs.com/eggs/safest-choice-eggs> (last visited Sept. 19, 2016) (emphasis added). As explained below, the UEP guidelines are not at all “strict.”

The company’s reference to UEP guidelines adds another layer of confusion, and offers a subtle suggestion that the hens producing its eggs live in cage-free housing, because UEP offers “Certified Guidelines” for housing both caged and cage-free hens. *See* UEP 2016 Guidelines at 26, *available at* <http://uepcertified.com/wp-content/uploads/2015/08/2016-UEP-Animal->



Buried in a blog entry from over a year ago, Davidson’s Safest Choice acknowledges that the two terms “pasteurized” and “pasture-raised” are “often confused but they are not one and the same,” and suggests reading the company’s infographic to “[u]nraavel the differences between pasteurized and pasture-raised.”<sup>12</sup> But in its more accessible advertising, Davidson’s Safest Choice adds to the confusion between the two terms. On its cartons and throughout its website, the company juxtaposes the words “PASTEURIZED” and “all natural,” immediately above visual representations of open, rolling pastures. *See* Attachment B (carton). And elsewhere on the company’s home webpage, a banner states, “pasteurized = peace of mind.”<sup>13</sup>

The website text also suggests that because Davidson’s Safest Choice pasteurizes its eggs, its production process “eliminates the risk of avian flu viruses as

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Welfare-Guidelines-2016-Cage-Free-Edit-002.pdf (last visited Sept. 22, 2016) (“Guidelines for Cage-Free Egg Production”). A consumer could read the Davidson’s Safest Choice reference to the “United Egg Producer Animal Welfare Plan,” visit the UEP website and its references to a certification for cage-free egg producers, and come away with the impression that Davidson’s Safest Choice eggs are all cage-free.

<sup>12</sup> DAVIDSON’S SAFEST CHOICE, *What is Pasteurized?*, Apr. 22, 2015, <http://www.safeeggs.com/blog/what-is-pasteurized> (last visited Sept. 21, 2016). Notably, after explaining that “[p]asture-raised (or pastured) refers to the living conditions of the animals,” the blog post does not explicitly state that Davidson’s Safest Choice does not source its eggs from pasture-raised suppliers. Instead, it furthers the confusion, simply stating that “Safest Choice Cage Free eggs are sourced from farms approved as Certified Humane.” *Id.* And while the infographic to which the blog post directs the viewer does distinguish between “pasteurized” and “pasture-raised,” it does little to clarify—and, in fact, misleads the viewer about—the living conditions of the hens producing Davidson’s Safest Choice eggs. *See* DAVIDSON’S SAFEST CHOICE, *Unscrambling Egg Lingo*, Aug. 15, 2014, <http://www.safeeggs.com/blog/unscrambling-egg-lingo/> (last visited Sept. 19, 2016). The infographic, which includes a “Davidson’s Safest Choice” company logo showing a traditional red barn and hens standing in a green pasture, also displays as its background imagery silhouettes of hens with intact beaks walking on silhouettes of pastures. In addition, the infographic shows silhouettes of eggs lying in grass, suggesting that Davidson’s Safest Choice eggs are laid by hens in open pastures. *Id.*

<sup>13</sup> DAVIDSON’S SAFEST CHOICE, <http://www.safeeggs.com> (last visited Sept. 19, 2016).

well as Salmonella bacteria.”<sup>14</sup> Similarly, the company states on its Frequently Asked Questions webpage that it “protect[s] public health by pasteurizing safe eggs in both cage free and conventional egg options under the Safest Choice Pasteurized Eggs brand.”<sup>15</sup> The website does not appear to limit its claim of protecting *only human consumers of eggs* from “the risk of avian flu” and “Salmonella bacteria.” Pasteurizing hens’ eggs does nothing to protect hens themselves from contracting highly pathogenic bacteria and avian flu. Both are a significant threat to human health and safety, which the company incorrectly claims it is “eliminating.”<sup>16</sup>

### **3. The advertising and statements in an industry magazine.**

Davidson’s Safest Choice also makes misleading representations in the August 2016 issue of the *Progressive Grocer*, a trade magazine for the grocery industry. See Attachment E (advertisements and article in August 2016 *Progressive Grocer*). The photographed carton on page 68, as well as the advertisements on pages 72-73, includes a logo of a traditional red barn surrounded by green fields. *Id.* Notably, the picture depicts hens standing in grass on each side of the barn. *Id.*; see also *id.* (extracted image of Davidson’s Safest Choice logo from magazine). In addition, the advertisement on page 72 of the magazine includes, in the largest font, the phrase

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<sup>14</sup> *Id.*

<sup>15</sup> DAVIDSON’S SAFEST CHOICE, *Safest Choice Pasteurized Eggs FAQ*, <http://www.safeeggs.com/eggs/safest-choice-eggs> (last visited Sept. 19, 2016).

<sup>16</sup> See Berstein, *Current bird flu in China could become ‘pandemic’ threat to humans, researchers say*, THE WASHINGTON POST, Mar. 11, 2015 available at <https://www.washingtonpost.com/news/to-your-health/wp/2015/03/11/current-bird-flu-in-china-could-become-pandemic-threat-to-humans-researchers-say/> (describing a recent bird flu that “mutated frequently,” and quoting researchers as concluding that “it is reasonable to expect the H7N9 and other [avian flu] viruses to persist and cause a substantial number of severe human infections”); McNeil, *Closing of Live Poultry Markets is Called Effective in Flu Fight*, THE NEW YORK TIMES, Oct. 31, 2013, at A9 (describing how the H5N1 avian flu can be fatal to humans).

“Not All Eggs Are Created Equal,” implying that the *creation* of the Davidson Safest Choice eggs (*i.e.*, the production process regarding the hen laying the egg) is better than how other companies’ eggs are created.

Thus, the combined effect of the text and imagery employed by Davidson’s Safest Choice in the *Progressive Grocer* advertisement, its webpages and its products’ labels, is to give the consumer every reason to believe that the eggs were produced by hens living in cage-free conditions with access to outdoor pastures. It defies logic that a reasonable consumer would see all of these representations and believe that his or her “Farm-Fresh” eggs were produced in an environment not even remotely like the images on the label or the company’s website. No words on the label contradict such reasonable expectations or attempt to correct this false depiction.

**B. Practices at Issue.**

Contrary to the pastoral representations on the Davidson’s Safest Choice egg cartons, website, and magazine advertising, the hens used to produce the company’s All-Natural eggs (as opposed to the company’s Cage Free line) spend their entire fatally abbreviated lives in conventional “battery cages.” Battery cages are cramped, densely packed, indoor wire cages; egg-producing hens living in battery cages cannot spread their wings, venture outside, breathe “fresh” air, or see natural sunlight.

The vast majority of America’s nearly 300 million egg-laying hens are confined in battery cages like those at issue here, which involve wire contraptions so small that the hens cannot spread or flap their wings, lie down, or even comfortably turn around.<sup>17</sup> Hens in battery cages stand night and day on painful, sloping wire mesh.<sup>18</sup>

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<sup>17</sup> See FARM SANCTUARY, FACTORY FARMING, *Chickens Used for Eggs*, at

Battery cages do not provide the opportunity for the hens to engage in basic natural behaviors, including nesting, dust-bathing, perching, foraging, and exercising, all of which are important for hen welfare.<sup>19</sup> Battery cages are so restrictive that the hens have no opportunity to exercise, as each hen is allowed an amount of floor space equivalent to less than a single sheet of letter-sized paper. The lack of exercise in cages leads to bone weakness, which often results in broken bones, especially at the end of the laying period when birds are removed from the cages.<sup>20</sup> Battery cages also cause extreme boredom and frustration—to prevent hens from attacking their cage mates, producers typically “debeak” young hens. This process involves amputating the ends of their beaks without anesthesia; debeaking likely causes chronic pain.<sup>21</sup>

Because of these numerous issues, a wide range of experts understand there to be substantial welfare concerns associated with housing hens in battery cages.<sup>22</sup> A

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<http://www.farmsanctuary.org/learn/factory-farming/chickens/> (last visited Sept. 20, 2016).

<sup>18</sup> Rollin, *FARM ANIMAL WELFARE: SOCIAL, BIOETHICAL, AND RESEARCH ISSUES* 126 (Ames, Iowa: Iowa State Press 1995) (“Battery cages are responsible for a variety of injuries, as birds are sometimes trapped in cages by the head and neck, body and wings, toes and claws, or other areas. In addition, steep floors can cause foot deformities, and wire mesh can lead to feather wear”).

<sup>19</sup> Duncan, *The pros and cons of cages*, 57 *WORLD’S POULTRY SCIENCE JOURNAL* 385 (2001).

<sup>20</sup> Baxter, *The welfare problems of laying hens in battery cages*, 134 *THE VETERINARY RECORD* 617, 618 (1994) (“The fact that hens are restricted from exercising to such an extent that they are unable to maintain the strength of their bones is probably the greatest single indictment of the battery cage. The increased incidence of bone breakage which results is a serious welfare insult”).

<sup>21</sup> Gentle et al., *Behavioural evidence for persistent pain following partial beak amputation in chickens*, 27 *APPLIED ANIMAL BEHAVIOUR SCIENCE* 149 (1990).

<sup>22</sup> See THE HUMANE SOCIETY OF THE UNITED STATES, *SCIENTISTS AND EXPERTS ON BATTERY CAGES AND LAYING HEN WELFARE*, <http://www.humanesociety.org/assets/pdfs/farm/HSUS-Synopsis-of-Expert-Opinions-on-Battery-Cages-and-Hen-Welfare.pdf> (last visited Mar. 20, 2016); EUROPEAN COMMISSION, *ATTITUDES OF CONSUMERS TOWARDS THE WELFARE OF FARMED ANIMALS*, Special Eurobarometer 229, European Commission, Brussels, Belgium, 2005. available at [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_229\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_229_en.pdf) (last visited Mar. 21, 2016).

report in the *Netherlands Journal of Agricultural Science* ranked twenty-two different hen housing systems and found that, on a zero-to-ten scale of animal welfare, battery cages rate as 0.0.<sup>23</sup>

Accordingly, the European Union started phasing out cages in 1999, after it concluded that “the welfare conditions of hens kept in current battery cages [. . .] are inadequate.”<sup>24</sup> Five separate U.S. states have since banned battery cages,<sup>25</sup> and nations including India, New Zealand, Bhutan, and Taiwan have each made plans to ban battery cages as well.<sup>26</sup>

In addition, contrary to Davidson’s Safest Choice’s claims that its style of egg production “eliminates the risk of avian flu viruses as well as Salmonella bacteria,” the battery cage method that produces its All-Natural eggs presents special animal health, public health, and food safety risks. Close confinement has been shown to breed dangerous pathogens. Eggs from hens living in battery cages are a leading

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<sup>23</sup> RM De Mol et al., *A Computer Model for Welfare Assessment of Poultry Production Systems for Laying Hens*, 54 NETHERLANDS J. AGRIC. SCI. 157, 165 (2006), available at <http://www.sciencedirect.com/science/article/pii/S1573521406800199> (last visited Oct. 7, 2016).

<sup>24</sup> Council Directive 1999/74, 1999 O.J. (L 202) 53 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:203:0053:0057:EN:PDF>. (last visited Sept. 20, 2016).

<sup>25</sup> See California (Cal. Health & Safety Code § 25996); Michigan (Mich. Comp. Laws § 287.746); Ohio (Ohio Admin. Code 901:12-9-03); Oregon (Or. Rev. Stat. § 632.840); Washington (Wash. Rev. Code § 69.25.107).

<sup>26</sup> HUMANE SOCIETY INTERNATIONAL, *Hope for Hens: India Agrees that Battery Cages are Illegal*, [http://www.hsi.org/world/india/news/news/2013/05/victory\\_hens\\_india\\_051413.html](http://www.hsi.org/world/india/news/news/2013/05/victory_hens_india_051413.html) (visited Sept. 20, 2016); Associated Press New Zealand, *New Battery Hen Cages Banned*, NEW ZEALAND HERALD, Dec. 12, 2012, available at [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10852437](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10852437) (visited Sept. 20, 2016); HUMANE SOCIETY INTERNATIONAL, *Bhutan Bans Extreme Confinement Cages for Egg-Laying Hens*, [http://www.hsi.org/news/press\\_releases/2012/08/bhutan\\_cage\\_free\\_080212.html](http://www.hsi.org/news/press_releases/2012/08/bhutan_cage_free_080212.html) (visited Apr. 12, 2016); COUNCIL OF AGRICULTURE, *COA Drew Up “Animal Friendly Egg Production System Definition and Guideline” as Reference for the Industry to Jointly Promote Animal Welfare*, [http://eng.coa.gov.tw/content\\_view.php?catid=2500808&hot\\_new=8790](http://eng.coa.gov.tw/content_view.php?catid=2500808&hot_new=8790) (visited Apr. 12, 2016).

cause of human *Salmonella* infection.<sup>27</sup> More than a dozen scientific studies have found significantly higher *Salmonella* rates in cage facilities versus cage-free facilities.<sup>28</sup> Manure pits associated with high-density bird stocking provide a means for disease breeding and transfer, and caged facilities are harder to clean and disinfect.<sup>29</sup> In fact, a federal district court in 2012 found that National Pasteurized Eggs, Inc., which does business as Davidson’s Safest Choice, had taken a position:

effectively denying it achieves a 5-log reduction in *Salmonella* in the yolk, in the face of earlier representations to the [Food and Drug Administration] and to consumers that its ‘purpose’ and ‘guaranty’ is that such a reduction is achieved.<sup>30</sup>

Moreover, while the pasteurization process that Davidson’s Safest Choice uses at a processing plant *after the eggs leave the battery cage facility* may kill some *Salmonella*,

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<sup>27</sup> See HSUS, AN HSUS REPORT: FOOD SAFETY AND CAGE EGG PRODUCTION 2 (May 2011), at [http://www.humanesociety.org/assets/pdfs/farm/report\\_food\\_safety\\_eggs.pdf](http://www.humanesociety.org/assets/pdfs/farm/report_food_safety_eggs.pdf) (last visited Mar. 21, 2015) (collecting studies).

<sup>28</sup> See, e.g., Denagamage, *et al.*, *Risk Factors Associated with Salmonella in Laying Hen Farms: Systemic Review of Observational Studies*, 59 AVIAN DISEASES 291 (2015) (finding a “high risk of *Salmonella* for hens reared in cages.”); Watanabe, *et al.*, *Henhouse Feeding Style and Salmonella Enteritidis Contamination in Unvaccinated Flocks of Egg Farms*, 74 J. VET. MED. SCI. 575 (2012) (finding cases of *Salmonella* at 12.7 percent of conventional cage systems and 6.1 percent of cage-free systems); Van Hoorebeke, *et al.*, *Influence of the Housing System on Salmonella Infections in Laying Hens: A Review*, 58(5) ZOOSES & PUB. HEALTH 304 (2011) (“[T]he majority of the studies suggest that housing of laying hens in conventional battery cages significantly increases the risk of detecting *Salmonella* compared to the housing in non-cage housing systems.”); EUROPEAN FOOD SAFETY AUTHORITY, REPORT OF THE TASK FORCE ON ZOOSES DATA COLLECTION ON THE ANALYSIS OF THE BASELINE STUDY ON THE PREVALENCE OF *SALMONELLA* IN HOLDINGS OF LAYING HEN FLOCKS OF *GALLUS GALLUS* (2007), available at [http://www.efsa.europa.eu/sites/default/files/scientific\\_output/files/main\\_documents/97r.pdf](http://www.efsa.europa.eu/sites/default/files/scientific_output/files/main_documents/97r.pdf); AN HSUS REPORT: FOOD SAFETY AND CAGE EGG PRODUCTION, *supra* note 27 (collecting studies).

<sup>29</sup> Carrique-Mas *et al.*, *Salmonella enteritidis in commercial layer flocks in Europe: Legislative background, on-farm sampling and main challenges*, 10 BRAZILIAN J. POULTRY SCI. 1 (Jan-Mar 2008), available at [http://www.birdflubook.org/resources/Carrique\\_2008\\_BJPS\\_10\\_1.pdf](http://www.birdflubook.org/resources/Carrique_2008_BJPS_10_1.pdf).

<sup>30</sup> *Nat’l Pasteurized Eggs, Inc. v. Michael Foods, Inc.*, 2012 U.S. Dist. LEXIS 191647, \*99 (W.D. Wis. May 18, 2012). The district court then dropped a footnote, explaining that the company’s position “would seem to expose it to *potential claims for fraudulent advertisement* and fraud on the FDA claims.” *Id.* at \*99-100 n.25 (emphasis added).

the battery cage method certainly does not “eliminate” Salmonella from all final egg products.<sup>31</sup> Nor has it “eliminated” avian influenza.<sup>32</sup> In addition, bacteria and viruses from eggs that Davidson’s Safest Choice pasteurizes can still infect other hens and eggs at the originating battery cage facility supplier, or spread to other battery cage factory farms, and such eggs may not undergo the pasteurization process, risking human infection.<sup>33</sup>

Davidson’s Safest Choice also claims that it “adheres to the strict guidelines of the United Egg Producer Animal Welfare Plan.” In truth, the United Egg Producers (“UEP”) guidelines are not at all “strict.” UEP is an industry trade organization that certifies over 80 percent of the commercial egg market.<sup>34</sup> UEP standards permit nearly every conventional industry practice (including the use of debeaking without

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<sup>31</sup> See Latimer HK, et al., *Evaluating the Effectiveness of Pasteurization for Reducing Human Illnesses from Salmonella spp.* In *Egg Products: Results of a Quantitative Risk Assessment*, 5 *FOODBORNE PATHOGENS & DISEASE* 59, 64-66 (2008) (finding “fraction[s] of *Salmonella* predicted to survive pasteurization,” particularly in egg white product, and noting a USDA FSIS survey of inspections recovered *Salmonella* from 79 samples between 1995 and 2003 to support the hypothesis that “consumption of pasteurized egg products does cause cases of illness with *Salmonella*, albeit relatively few”).

<sup>32</sup> See generally, HUMANE SOCIETY INTERNATIONAL, AN HSI REPORT: HUMAN HEALTH IMPLICATIONS OF INTENSIVE POULTRY PRODUCTION AND AVIAN INFLUENZA, at [http://www.hsi.org/assets/pdfs/hsi-fa-white-papers/human\\_health\\_implications\\_of.pdf](http://www.hsi.org/assets/pdfs/hsi-fa-white-papers/human_health_implications_of.pdf); see also Chmielewski et al., *Evaluation of the U.S. Department of Agriculture’s Egg Pasteurization Processes on the Inactivation of High-Pathogenicity Avian Influenza Virus and Velogenic Newcastle Disease Virus in Processed Egg Products*, 76 *J. FOOD PROT.* 640, 644 (2013) (discussing how the USDA pasteurization parameters for the salted and sugared egg yolk products and egg substitute with fat products showed reduction of certain avian viruses “well below the performance standard for a lethality process”).

<sup>33</sup> R.C. Axtell & J.J. Arends, *Ecology and Management of Anthropod Pests of Poultry*, 35 *ANNUAL REV. ENTOMOLOGY* 101, 118 (1990), available at [http://www.birdflubook.org/resources/Axtell\\_1990\\_ARE\\_35\\_101.pdf](http://www.birdflubook.org/resources/Axtell_1990_ARE_35_101.pdf) (last visited Sept. 20, 2016) (“The worldwide spread of modern, high-density confined poultry systems . . . has intensified the importance of a select number of” disease carrying flies and rodents).

<sup>34</sup> See UNITED EGG PRODUCERS, *Animal Welfare*, at <http://www.unitedegg.org/AnimalWelfare/default.cfm> (last visited Sept. 20, 2016) (“Today, more than 80% of all eggs produced in the United States are produced under the UEP Certified guidelines”).

pain relief), create increased food safety risks, and allow for airborne ammonia concentrations inside battery cage buildings that can exceed worker safety exposure thresholds instituted by the Occupational Safety and Health Administration (“OSHA”). Moreover, battery cage confinement as allowed by UEP standards does not produce the “safest” eggs, as many studies have found significantly higher *Salmonella* rates in battery cage facilities than in cage-free facilities.<sup>35</sup> Thus, Davidson’s Safest Choice eggs meet only the most ordinary industry standards, which do not guarantee the “safest” eggs or humane treatment, and are hardly “strict guidelines.”

### **C. Past Misleading Animal Welfare Claims.**

Misrepresentations about animal welfare are not uncommon in the retail market for eggs produced in battery cages. The Commission is no doubt familiar with the Better Business Bureau (“BBB”) ruling in 2003 (and upheld in 2004) that the UEP (of which Davidson’s Safest Choice is a member) was misleading consumers about animal welfare in the egg industry. While some practices subject to that ruling have since been slightly altered under the United Egg Producer Certified guidelines, the majority of practices—including intensive confinement in battery cages—are still permitted. As reported by the Associated Press in 2004: “While the BBB found that the egg industry’s standards have improved treatment of hens, it’s not to a level that most consumers would find humane.”<sup>36</sup>

Davidson’s Safest Choice, therefore, is producing its All-Natural eggs using

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<sup>35</sup> See *supra* note 28 and accompanying text.

<sup>36</sup> Associated Press, *Business Group Shells Egg-Industry Ads: Better Business Bureau Disputes Humane Claim*, NBC NEWS, May 11, 2004, available at <http://www.msnbc.msn.com/id/4951194/> (last visited Mar. 21, 2016) (hereinafter, “AP, *Better Business Bureau Disputes*”); see also *United Egg Producers, Inc. (Animal Care Certified Eggs)*, Report #4108, NAD CASE REPORTS (Nov. 2003).



practices that consumers do not consider humane—hens kept in battery cage facilities. Because of consumer preferences, the company understandably would not want to advertise its use of hen housing conditions that most consumers do not consider humane. It is quite another thing, however, to prey upon welfare-conscious consumers (and disadvantage competitors that sell eggs from hens that are not raised in battery cages) by materially misleading consumers into thinking that the eggs they are buying do not come from battery cages. Davidson’s Safest Choice’s representations are particularly problematic because the company has previously admitted—in an April 2015, difficult-to-find blog post that most consumers would never see—that many consumers confuse “pasteurized” and “pasture-raised,”<sup>37</sup> and because the company has previously been the target of allegations of misleading advertising.<sup>38</sup>

**ANALYSIS OF REPRESENTATIONS UNDER  
THE FEDERAL TRADE COMMISSION ACT**

For a representation to be unlawfully deceptive under Section 5 of the FTC Act, it must be both “material” and “deceptive.”<sup>39</sup> As described below, Davidson’s Safest Choice representations about the eggs that it sells satisfy both elements.

**A. Davidson’s Safest Choice Representations Are Material.**

Materiality is established when the deception “is likely to affect the consumer’s conduct or decision with regard to a product or service.”<sup>40</sup> Here, the Davidson’s Safest Choice label is directed at those consumers most likely to be misled by them:

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<sup>37</sup> DAVIDSON’S SAFEST CHOICE, *What is Pasteurized?*, Apr. 22, 2015, <http://www.safeeggs.com/blog/what-is-pasteurized> (last visited Sept. 19, 2016).

<sup>38</sup> See Attachment D (COK 2006 Rulemaking Petition), described *supra* note 8.

<sup>39</sup> FTC Policy Statement on Deception, *supra* note 2.

<sup>40</sup> *Id.*

conscientious consumers inclined to purchase eggs from free roaming hens.

It is beyond dispute that consumers care deeply about the welfare of animals raised for food, and that consumers rely on labeling representations like those made by Davidson's Safest Choice to identify animal products that they consider to be ethically produced. The FTC, the Better Business Bureau, and even the egg industry have each firmly recognized that social issues, including the treatment of animals, are of significant concern to consumers and have an important bearing on consumer purchasing decisions.<sup>41</sup>

Nowhere is this more accurate than in the market for shell eggs, where public aversion to eggs from battery cages is widespread and well-documented. A 2000 Zogby Analytics poll, for example, found that 86.2 percent of respondents believe the use of battery cages in egg production is unacceptable.<sup>42</sup> Five states and the entire European Union have banned the practice.<sup>43</sup> When Californians voted on the issue in 2008, a

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<sup>41</sup> *Starbucks Corporation (Free Trade Certified Coffee)*, Report #4592, NAD CASE REPORTS, at 1 (Nov. 8, 2006) (“Advertising claims which tout that the advertiser is addressing particular social or ethical concerns can provide consumers with important information about their purchasing choices.”); Golin/Harris Int’l, *Laying out the Facts*, 10 (2004) (study commissioned by the UEP finds that “50 percent of consumers rate animal welfare issues as important in deciding which foods and brands to buy, and which stores to shop”); see also Context Mktg., *Ethical Food: A Research Report on the Ethical Claims That Matter Most to Food Shoppers and How Ethical Concerns Influence Food Purchases* 4, (2010), at <https://web.archive.org/web/20130928195843/http://contextmarketing.com/sources/feb28-2010/ethicalfoodreport.pdf> (sixty-nine percent of consumers will pay more for “food produced to higher ethical standards,” and 91 percent of consumers include animal welfare in their criteria for whether something is ethically produced).

<sup>42</sup> J.C. Swanson & J.A. Mench, *Animal Welfare: Consumer Viewpoints* 2-3 (2000) (also citing a 1995 poll by Caravan Opinion Research Corporation finding that 90 percent of respondents strongly disapproved of keeping hens in cages where they could not spread their wings); *Bird Husbandry Production Costs Are Market Issue*, *Feedstuffs*, Oct. 16, 2000, at 1 (UEP then-Senior Vice President acknowledging that consumers are “shocked” when they learn about cage confinement of laying hens).

<sup>43</sup> See Cal. Health & Safety Code §§ 25990-25991(b), (f), (i); Mich. Comp. Laws Ann. § 287.746(1)(b), (2); Ohio Admin. Code 901:12-9-03(F)(6); Or. Rev. Stat. Ann. § 632.840(1)(d)

measure banning traditional battery cage confinement passed with a whopping 63.5 percent of the vote.<sup>44</sup>

In states without a ban on battery cages, concerned individuals have largely turned to consumer activism, avoiding eggs from battery cages and instead preferring—and often paying a premium for—eggs from higher welfare sources like cage-free, free-range, and pasture-based operations.<sup>45</sup> As of April 2016, fourteen percent of shell eggs sold at U.S. grocery stores are now sourced from cage-free operations—up from two percent in 2008—and that number continues to grow

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(Oregon's standards are dependent upon the American Humane Society's farm animal welfare certification program. The housing standards can be found at [http://humaneheartland.org/index.php?option=com\\_content&view=article&id=3&Itemid=106&jsmallfib=1&dir=JSROOT/Animal+Welfare+Standards+Full+Standards+%2B+Supplements;select+Layers+Enriched+Colony+Housing-Animal+Welfare+Standards](http://humaneheartland.org/index.php?option=com_content&view=article&id=3&Itemid=106&jsmallfib=1&dir=JSROOT/Animal+Welfare+Standards+Full+Standards+%2B+Supplements;select+Layers+Enriched+Colony+Housing-Animal+Welfare+Standards), on p. 20); Wash. Rev. Code Ann. § 69.25.107; Council Directive 99/74, arts. 4-6, 1999 O.J. (L 203) 53, 54-55 (EC).

<sup>44</sup> Inst. of Governmental Studies, Proposition 2, (2016), at <https://igs.berkeley.edu/library/elections/proposition-2>.

<sup>45</sup> Consumer surveys have consistently found that a majority of consumers prefer—and would pay more for—eggs from higher welfare sources if they had the option. *See, e.g.*, Yan Heng et al., *Consumer Attitudes toward Farm-Animal Welfare: The Case of Laying Hens* 38 J. OF AGRIC. & RES. ECONS. 418, 430 (2013), available at <http://www.waeonline.org/UserFiles/file/JAREDec2013Hengpp418-434.pdf> (finding that 81-86 percent of respondents were willing to pay a premium for eggs from hens given outdoor access); F. Bailey Norwood & Jayson L. Lusk, *A Calibrated Auction-Conjoint Valuation Method: Valuing Pork and Eggs Produced under Differing Animal Welfare Conditions*, 62 J. ENVTL. ECONS. & MGMT. 80 (July 2011) (finding that consumers highly value cage-free systems and are willing to pay a \$0.95 premium for a dozen eggs raised in a cage-free system rather than a traditional caged system); Fabien Tepper, *The New Ethics of Eating*, Christian Sci. Monitor, Dec. 7, 2014, at <http://www.csmonitor.com/USA/Society/2014/1207/The-new-ethics-of-eating> (finding 56 percent of Americans said they would pay more money to know their eggs came from hens raised with enough space to stretch their limbs); Robert Prickett, *Consumer Preferences for Farm Animal Welfare: Results from a Telephone Survey of US Households* (2008) (unpublished M.S. dissertation, Okla. State Univ.), available at <http://cratefreefuture.com/pdf/American%20Farm%20Bureau-Funded%20Poll.pdf> (finding that 49 percent of Americans consider the well-being of farm animals when making purchasing decisions about meat, and 76 percent disagreed with the statement that low meat prices are more important than the well-being of farm animals).

rapidly.<sup>46</sup> But because consumers cannot independently determine the conditions by which an egg was produced, they must typically rely on labeling representations to identify higher welfare eggs.<sup>47</sup>

Davidson's Safest Choice clearly understands that cage-free and other higher welfare eggs are premium commodities, because it even produces a percentage of its eggs using cage-free methods in order to reach these consumers.<sup>48</sup> And for its eggs produced using battery cages, Davidson's Safest Choice has taken the uncommon step of investing in a full-color sticker to affix to its packaging in order to make false representations. Many consumers of Davidson's Safest Choice All-Natural eggs would

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<sup>46</sup> Jayson Lusk, *Market Potential for Cage-Free Eggs*, World Society for the Protection of Animals, available at [http://choosecagefree.org/sites/default/files/pdfs/CFreportday2\\_4%209.pdf](http://choosecagefree.org/sites/default/files/pdfs/CFreportday2_4%209.pdf) (last visited Sept. 20, 2016) (noting that the cage-free eggs comprised 2% of the market share for eggs in 2008); Justin Morton, *Cage-Free Eggs may be Golden Goose for Retail Profits*, BLOOMBERG NEWS, Mar. 25, 2016, available at <http://www.bloomberg.com/news/articles/2016-03-25/cage-free-eggs-may-be-golden-goose-for-retail-profits> (visited Sept. 20, 2016) (noting that cage-free eggs comprised 14 percent of the market share for eggs in 2016). To be sure, the future of egg production appears to be cage-free. Recently, McDonald's, which purchases four percent of U.S.-produced eggs, committed to phasing out the use of eggs from cage-free operations. Stephanie Strom, *McDonald's Plans a Shift to Eggs from Only Cage-Free Hens*, THE NEW YORK TIMES, Sept. 9, 2015, available at [http://www.nytimes.com/2015/09/10/business/mcdonalds-to-use-eggs-from-only-cage-free-hens.html?\\_r=0](http://www.nytimes.com/2015/09/10/business/mcdonalds-to-use-eggs-from-only-cage-free-hens.html?_r=0) (last visited Sept. 20, 2016). Many other major buyers are also transitioning to cage-free sources. See, e.g., Eliza Barclay, *The Year in Eggs: Everyone's Going Cage-Free, Except Supermarkets*, NPR, Jan. 6, 2016, available at <http://www.npr.org/sections/thesalt/2015/12/30/461483821/the-year-in-eggs-everyones-going-cage-free-except-supermarkets>; Beth Kowitt, *Target Joins Growing List of Food Companies Committing to Cage-Free Eggs*, FORTUNE, Jan. 20, 2016, available at <http://fortune.com/2016/01/20/target-cage-free-eggs/>. Meanwhile, in the U.K., 53 percent of eggs purchased today at grocery stores are not just cage-free but fully free-range. Egg Info, Industry Data, at <https://www.egginfo.co.uk/egg-facts-and-figures/industry-information/data> (last visited Sept. 20, 2016).

<sup>47</sup> Golin/Harris Int'l, *supra* note 41, at 9 (UEP-financed study finding that 54 percent of consumers were willing to pay 5-10 percent more for eggs with the label "Animal Care Certified," 10 percent were willing to pay 15-20 percent more, and 77 percent reported they would switch or consider switching to a brand with such a label).

<sup>48</sup> See DAVIDSON'S SAFEST CHOICE, *Cage Free Eggs*, <http://www.safeeggs.com/news/cage-free-eggs> (last visited Sept. 21, 2016).

surely be horrified to learn that its hens not only were not raised in the pastures pictured on the egg container packaging, but were in fact inhumanely confined in a system that is widely understood to represent the lowest tier of laying hen husbandry in the industry.<sup>49</sup> Davidson's Safest Choice's representations that its hens are raised in high-welfare conditions are, thus, material to a vast number of consumers.

Post Holdings, the company that recently announced acquisition of National Pasteurized Eggs, Inc. dba Davidson's Safest Choice, is similarly aware that cage-free eggs are premium commodities for which consumers are willing to pay higher prices. In its 2015 Annual Report, Post Holdings explained:

[The Coalition for Sustainable Egg Supply] conducted a multi-year study evaluating different types of hen housing systems which found each has advantages and disadvantages. Nonetheless, *consumers and customers are demonstrably moving toward egg products from cage-free housing*, and [Post Holdings subsidiary] Michael Foods will move with the market. We expect to add cage-free capacity and/or to convert existing capacity to cage-free in lockstep partnership with customers who have determined that they will convert to cage-free sourcing.<sup>50</sup>

Thus, the new owner of Davidson's Safest Choice also understands that animal welfare representations are material to consumers.

**B. Davidson's Safest Choice Representations Are Likely to Mislead.**

Many consumers will also find Davidson's Safest Choice words and images misleading. As a threshold matter, advertisers are responsible for *all* reasonable consumer interpretations, so it does not matter that the company's representations

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<sup>49</sup> See, e.g., De Mol, *supra* note 23, at 164 (modeling welfare outcomes under twenty-two different hen housing systems and ranking caged systems last).

<sup>50</sup> Post Holdings, Inc. 2015 Annual Report 3 (Nov. 25, 2015), *available at* <https://www.postholdings.com/sites/postholdings.com/files/POST-2015-Annual-Report.pdf> (last visited Sept. 21, 2016).

may convey differing meanings to different consumers. “To be considered reasonable, the interpretation or reaction does not have to be the only one.”<sup>51</sup> Instead, “[w]hen a seller’s representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation.”<sup>52</sup> When a particular consumer group is targeted, or likely to be affected by the advertisement, the advertisement should be examined from the perspective of a reasonable member of that group.<sup>53</sup> Here, Davidson’s Safest Choice labeling representations target consumers most likely to be misled: consumers who are concerned about the welfare of farm animals, and who look to product labels to identify goods that were produced in a manner they consider to be humane. Many such consumers, and the general public, more broadly, will reasonably interpret Davidson’s Safest Choice representations as saying just that.

#### **1. Misleading egg carton representations.**

Most conspicuously, the Davidson’s Safest Choice egg containers are misleading.

*Animal welfare representations.* By picturing a pastoral setting of free roaming hens with intact beaks, along with an egg sitting in grass next to a traditional red barn, the label implies that hens at suppliers for Davidson’s Safest Choice All-Natural eggs are given access to pasture, are not debeaked, and lay their eggs in the pastures that surround small, local family farms. These representations specifically suggest to

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<sup>51</sup> FTC Policy Statement on Deception, *supra* note 2, at 3.

<sup>52</sup> *Id.*

<sup>53</sup> FTC Policy Statement Regarding Advertising Substantiation, *supra* note 5, at 1.

consumers that the eggs are produced on “pastured” farms, which many consumers consider to represent the highest standard of laying-hen welfare.<sup>54</sup>

The accompanying text, representing that the eggs are “all-natural” and “Farm-Fresh,” and juxtaposing “pasteurized” above a large, green pasture, has the foreseeable effect of bolstering the implication of high hen welfare. A reasonable consumer could easily interpret these claims as further suggesting that Davidson’s Safest Choice eggs come from hens roaming pastures like the one pictured on the carton, and that eggs are “all-natural” and “farm fresh” because the hens have access to sunlight, fresh air, and acres of grass.<sup>55</sup> No reasonable consumer would see the verdant imagery and “all-natural” claims and think of a complex of factory farms owned by National Pasteurized Eggs, a geographically widespread egg-producing corporation, where hens are confined in cramped, filthy cages and never see the light of day. And yet, no words on the label contradict these reasonable expectations or attempt to correct this false depiction. It would have been easy for Davidson’s Safest Choice to select a label that more accurately represents the conditions on its production facilities—or at least one that does not address the conditions at all. Instead, knowing that reasonable consumers may rely on its label’s depictions, Davidson’s Safest Choice made this graphic the focal point of its label, a graphic that

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<sup>54</sup> See, e.g., Heng et al., *supra* note 45, at 430 (81-86 percent of respondents were willing to pay a premium for eggs from hens given outdoor access); Norwood & Lusk, *supra* note 45 (consumers on average willing to pay \$0.95 premium for cage-free eggs raised in a cage-free system rather than a traditional caged system); Tepper, *supra* note 45 (56 percent of Americans said they would pay more money to know their eggs came from hens raised with enough space to stretch their limbs).

<sup>55</sup> See DAVIDSON’S SAFEST CHOICE, *What is Pasteurized?*, Apr. 22, 2015, <http://www.safeeggs.com/blog/what-is-pasteurized> (last visited Sept. 21, 2016) (“Pasteurized vs pasture-raised: These two words are often confused but they are not one and the same”).

can impart only a materially false impression of the company's standards regarding the treatment of animals.

Animal and human health and safety representations. The Davidson's Safest Choice All-Natural eggs carton states that the company's eggs are the "Safest Choice," and that the company's "eggs are pasteurized to eliminate Salmonella." See Attachment B (carton label). But the company has no basis to make the bold and irresponsible claim that its eggs are not just "safe," but "the *safest choice*," and that its egg production methods will "eliminate Salmonella"—particularly not when the latest and most reliable studies indicate that battery cage facilities are substantially *less* safe than the alternatives. These studies have consistently found that the risks of spreading *Salmonella* among hens are much higher at cage facilities than cage-free—more than twice as high, according to some studies.<sup>56</sup>

This is partially due to the unsanitary nature of this type of farming. The manure pits typical of many battery cage operations are considered "ideal nesting grounds for rodents,"<sup>57</sup> which have been found to be "particularly persistent" in cage operations because they can breed in manure pits and "gain access to feeders, without interference from the birds" that are confined in cages.<sup>58</sup> Flies, another known vector

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<sup>56</sup> EUROPEAN FOOD SAFETY AUTHORITY, *supra* note 28, at 23 ("[C]age production was associated with a [sic] increased risk of *S. Enteritidis* positivity compared to barn, organic, and free-range standard production."); Denagamage, et al., *supra* note 28, at 293 (finding a "high risk of Salmonella for hens reared in cages"); Van Hoorebeke, et al., *supra* note 28, at ("[T]he majority of the studies suggest that housing of laying hens in conventional battery cages significantly increases the risk of detecting Salmonella compared to the housing in non-cage housing systems."); Watanabe, et al., *supra* note 28, at 577 (finding cases of Salmonella at 12.7 percent of conventional cage systems and 6.1 percent of cage-free systems).

<sup>57</sup> Carrique-Mas et al., *supra* note 29, at 6-7.

<sup>58</sup> G.C. Mead, FOOD SAFETY CONTROL IN THE POULTRY INDUSTRY (2005).



for *Salmonella* on egg farms, are also more prevalent “by far” in caged facilities.<sup>59</sup> Outbreaks in caged operations can be so extensive that in 2010, 550 million eggs from cage operations had to be recalled after sickening an estimated 1,900 customers.<sup>60</sup> Indeed, according to federal regulators, pasteurization does not “eliminate” the *Salmonella* threat—officials at the U.S. Department of Agriculture in 2008 published a scientific article concluding that “[i]t is reasonable to assume that people become exposed to *Salmonella* by consuming pasteurized egg products.”<sup>61</sup>

Moreover, a federal district court has found that Davidson’s Safest Choice had “den[ie]d it achieves a 5-log reduction in Salmonella in the yolk [of its eggs], in the face of earlier representations to the FDA and to consumers that its ‘purpose’ and ‘guaranty’ is that such a reduction is achieved.”<sup>62</sup>

It is, therefore, irresponsible and unlawful for Davidson’s Safest Choice to claim that its battery eggs are the “safest” eggs in the world. Claims that a product is “the safest” are clearly material to consumers.<sup>63</sup> And with regard to Salmonella, in

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<sup>59</sup> Olsen & Hammack, *Isolation of Salmonella spp. from the Housefly, Musca Domestica L., and the Dump Fly, Hydrotaea Aenescens at Caged-Layer Houses*, 63 J. OF FOOD PROT. 7 (July 2000); see generally, Axtell & Arends, *supra* note 33.

<sup>60</sup> Associated Press, *Iowa Executives Charged in Egg Salmonella Outbreak*, DES MOINES REGISTER, May 21, 2014, available at <http://www.desmoinesregister.com/story/money/business/2014/05/21/iowa-executives-charged-in-egg-salmonella-outbreak/9373803/> (last visited Apr. 27, 2016).

<sup>61</sup> Latimer et al., *supra* note 31, at 66 (describing risk of contamination occurring from “incomplete pasteurization or postpasteurization contamination”).

<sup>62</sup> *Nat’l Pasteurized Eggs*, 2012 U.S. Dist. LEXIS 191647 at \*99.

<sup>63</sup> See, e.g., *In re Raw Health*, 133 F.T.C. 13 (2002) (FTC entering into consent order with company making false safety claims); *In re Gerber Prods. Co.*, 123 F.T.C. 1365, 1374 (1997) (same); *In re Genetus Alexandria, Inc.* 121 F.T.C. 62, 75 (1996) (same); see also FTC Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.3(d) (“Comparative environmental marketing claims should be clear to avoid consumer confusion about the comparison. Marketers should have substantiation for the comparison”).

particular, the term “safest” refers not only to disease exposure via egg consumption, but also to the risk of bacteria jumping from animals on factory farms to human populations.<sup>64</sup> Here, such “Safest Choice” hyperbole is not only unsupported by the weight of scientific evidence—it is contrary to it.

## **2. Misleading website representations.**

The Davidson’s Safest Choice website is also rife with misleading content. In addition to using the same misleading imagery of free-roaming hens and eggs on pastures, the website says that Davidson’s Safest Choice provides the “safest” and “farm-fresh” eggs, that “Safest Choice uses fresh Cage Free eggs from farms approved as Certified Humane,”<sup>65</sup> that its “All-Natural” eggs come from sources following the “strict guidelines” on animal welfare protection, and that its production method “eliminates the risk of avian flu viruses as well as Salmonella bacteria.” Attachment C (website screenshots).<sup>66</sup> Each of these statements contributes to the false impression that Davidson’s Safest Choice eggs come from sources that protect animal welfare and public health, or at least from producers who exceed the industry baseline for animal treatment. This is particularly true when the website is viewed in

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<sup>64</sup> See CENTERS FOR DISEASE CONTROL AND PREVENTION, *Antibiotic Resistance Threats in the United States*, at 72 (2013), available at <http://www.cdc.gov/drugresistance/pdf/ar-threats-2013-508.pdf> (last visited Sept. 21, 2016) (identifying the “[k]ey measures to prevent resistant infections” as including “[s]topping spread of *Salmonella* among animals on farms”); see also National Action Plan for Combating Antibiotic Resistance 22 (Mar. 2015) (explaining that interventions, like “good husbandry practices,” are necessary “to reduce the spread of antibiotic-resistance”).

<sup>65</sup> “Safest Choice” actually refers to both varieties that the company sells, “All-Natural” and “Cage Free.” Hence, this statement gives the misleading impression that both varieties included in “Safest Choice” use Certified Humane certified cage free eggs. See DAVIDSON’S SAFEST CHOICE, *Safest Choice Pasteurized Eggs*, at <http://www.safeeggs.com/safest-choice-pasteurized-eggs/pasteurized-eggs> (last visited Sept. 21, 2016).

<sup>66</sup> See also DAVIDSON’S SAFEST CHOICE, <http://www.safeeggs.com/> (last visited Sept. 21, 2016).

conjunction with the company's labeling illustrations. For example, its claims that all of its eggs are "farm-fresh" and "Certified Humane" clearly call to mind the images on its egg cartons of free-roaming hens, yet Davidson's Safest Choice omits the fact that each hen supplying their All-Natural eggs lives her entire life indoors, with less space than a sheet of paper per bird in which to move.<sup>67</sup>

Animal welfare representations. Davidson's Safest Choice's claim that "the hens that lay our eggs are kept in a housing system that adheres to the strict guidelines of the [UEP]" is misleading. The website does not explain that the UEP is a trade group that certifies the vast majority of commercial egg producers.<sup>68</sup> Nor does the company's website explain that the UEP "Animal Welfare" certification is for a *battery cage* "housing system," instead of the cage free certification that Davidson's Safest Choice touts.<sup>69</sup> In any event, UEP standards explicitly permit battery cage confinement and only require a minimum stocking density of 67 inches per hen.<sup>70</sup> This provides each hen with less space than a sheet of paper in which to spend her entire life. UEP standards also permit beak-trimming without anesthesia,<sup>71</sup> and allow for constantly high levels of ammonia concentration not far from the maximum allowable eight-hour exposure threshold for workers under OSHA regulations.<sup>72</sup>

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<sup>67</sup> See Analysis of Representations Section B.2.c, *infra*.

<sup>68</sup> UNITED EGG PRODUCERS, *About Us*, <http://www.unitedegg.org/> (last visited Apr. 27, 2016).

<sup>69</sup> See UEP 2016 Guidelines, *supra* note 11, at 26.

<sup>70</sup> *Id.* at 21, 24.

<sup>71</sup> *Id.* at 9-10.

<sup>72</sup> Compare 29 C.F.R. § 1910.1000(a)(2), Table Z-1 (setting a maximum eight-hour average for workers' ammonia exposure at fifty parts per million) with Attachment F, 2016 UEP Audit Scoresheet (only penalizing producers for failure to take corrective action at twenty-five parts per million).

As if these standards were not already lax, UEP's producer-friendly enforcement system allows producers to commit a number of egregious violations without the risk of censure. For example, a federal court recently found that an egg company, named Ohio Fresh Eggs,

passed a UEP Certified Program animal welfare audit despite several violations observed by the auditors. The auditors stated, 'Employees dumping birds in dumpster after being in Modified Atmosphere Killing System were observed beating birds with what looked like a 1 to 6 board. They also were stomping and stepping on birds still moving around in dumpster.'<sup>73</sup>

According to UEP procedures, UEP-certified caged producers maintain their certification by passing yearly, pre-announced audits with a score of 180 out of a possible 200 points.<sup>74</sup> However, most of the audit's standards trigger only a three- to five-point deduction if unmet. Therefore, a facility could theoretically fail six or even ten standards and still pass UEP inspection. These standards include fundamental animal welfare, occupational safety, and food safety requirements, such as the following:

- Are all hens able to stand comfortably upright within cage?
- Are pullets and hens handled in a way to avoid bone breaks or injury?
- Does [the] ventilation system allow for continuous flow of fresh air for all layers?
- Are concentrations of ammonia within the cage area monitored?
- Is corrective action taken when ammonia levels exceed 25 parts per million?

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<sup>73</sup> *In re Processed Egg Prods. Antitrust Litig.*, 2016 U.S. Dist. LEXIS 113110, \*8 (E.D. Pa. Sept. 28, 2016)

<sup>74</sup> See Attachment F (2016 UEP Audit Scoresheet).

- Does [the] company have a policy and plan in place to protect pullets and hens from unmonitored visitors as well as wild birds, rodents, and other animals?
- Are dead or injured birds removed from cages daily?<sup>75</sup>

Clearly, standards that permit numerous violations like these cannot be reasonably understood as “strict guidelines.” UEP certification currently represents, at best, an industry baseline standard, and, as discussed above, the FTC and BBB have already agreed its standards are “not to a level that most consumers would find humane.”<sup>76</sup> By contrast, numerous other certification schemes provide significantly higher standards, including requiring that hens be raised in cage-free, free-range, and pasture-based environments, and that they not be debeaked.<sup>77</sup> Thus, the Davidson’s Safest Choice claim that it is certified according to the “strict guidelines” of an “Animal Welfare Plan” is misleading, especially coupled with its confusing wording

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<sup>75</sup> Attachment F (2016 UEP Audit Scoresheet).

<sup>76</sup> Assoc. Press, *Better Business Bureau Disputes*, *supra* note 36; *see also United Egg Producers, Inc. (Animal Care Certified Eggs)*, Report #4108, NAD CASE REPORTS, at 9 (recommending that UEP’s “animal care certified” claim “be discontinued because it conveys a message of humane treatment that does not accurately reflect the actual level of care provided under the certification program”).

Notably, the representations at issue here are even more misleading than those at issue in the UEP case. Unlike the UEP, Davidson’s Safest Choice is not only making vague representations of “animal care.” Instead, it is making specific representations of how the hens were raised by using large, full color images and text. These representations do not merely suggest “animal care,” but instead communicate specific farming practices—that the egg producers are small farms with large open pastures, that its hens have spacious outdoor access, and do not have their beaks trimmed. If the UEP’s “Animal Care” representations were misleading then, the Davidson’s Safest Choice representations are doubly misleading now.

<sup>77</sup> *See, e.g.*, GLOBAL ANIMAL PARTNERSHIP, *The 5-Step Animal Welfare Rating Program*, <http://www.globalanimalpartnership.org/5-step-animal-welfare-rating-program> (delineating the organization’s five-tiered animal welfare certification scheme) (last visited Sept. 22, 2016); HSUS, *How to Decipher Egg Carton Labels*, [http://www.humanesociety.org/issues/confinement\\_farm/facts/guide\\_egg\\_labels.html](http://www.humanesociety.org/issues/confinement_farm/facts/guide_egg_labels.html) (explaining the requirements of various animal welfare certification schemes) (last visited Sept. 22, 2016).

suggesting that *all* of the company’s “Safest Choice” eggs are cage free and certified by Certified Humane.<sup>78</sup>

“Fresh” representations. The Davidson’s Safest Choice website states that consumers will enjoy “Farm-Fresh Flavor,” and that it uses “fresh Cage Free eggs from farms.” These claims are also misleading. For many consumers, the term “fresh,” when accompanied by webpage background imagery of a traditional red barn, spacious green pastures, and blue skies, strongly implies access to the outdoors; hence the phrase “out getting some fresh air.” Similarly, the Merriam-Webster Dictionary defines “fresh” as an adjective meaning “clean and pure.”<sup>79</sup> Few would imagine “fresh” to describe the conditions of the hens kept at the facilities producing its eggs, which are permanently confined indoors inside densely-packed sheds. These hens simply do not have access to fresh, outdoor air, sunlight, and grass. Instead, they are typically suspended above manure pits where they are forced to breathe concentrations of carbon dioxide, ammonia, and particulate matter.<sup>80</sup> And, as noted above, UEP certification standards provide no meaningful regulation of ammonia concentrations.<sup>81</sup> Thus, the Davidson’s Safest Choice promise of “Farm-Fresh” eggs is clearly misleading.

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<sup>78</sup> See *supra* note 65 and accompanying text; see also Attachment F (providing UEP audit checklist for both caged and cage-free facilities).

<sup>79</sup> *Fresh*, MERRIAM-WEBSTER DICTIONARY ONLINE, available at <http://www.merriam-webster.com/dictionary/fresh> (last visited Sept. 21, 2016).

<sup>80</sup> Green et al., *Air Quality and Hen Health Status in Three Types of Commercial Laying Hen Houses*, Iowa State University, available at [http://lib.dr.iastate.edu/cgi/viewcontent.cgi?article=1120&context=abe\\_eng\\_conf](http://lib.dr.iastate.edu/cgi/viewcontent.cgi?article=1120&context=abe_eng_conf) (last visited Apr. 27, 2016); Polat, *Effects of Poultry Building Design on Indoor Air Quality in Humid Climates*, 25 J. Anim. Plant Sci. 5 (2015), available at <http://www.thejaps.org.pk/docs/v-25-05/10.pdf> (last visited Apr. 27, 2016).

<sup>81</sup> See *supra* note 72 and accompanying text.

Safety representations. The company’s website, like its egg carton, boasts that its pasteurization eliminates certain diseases; the website also states that Davidson Safest Choice “eliminates the risk of avian flu viruses as well as Salmonella bacteria.” See Attachment C (website). The existence of Davidson’s Safest Choice and its egg pasteurization has clearly not “eliminate[d] the risk of avian flu viruses,” as the company broadly states. Davidson’s Safest Choice has been using its pasteurization method for many years. Yet, as its new owner Post Holdings observed in its 2015 Annual Report, in April 2014 “we had seen the largest outbreak of avian influenza in our Nation’s recorded history.”<sup>82</sup> Moreover, for the reasons described above, the company’s safety claims are misleading about the spread of bacteria and how its egg production methods relate to human and animal health.<sup>83</sup>

### **3. Misleading magazine representations.**

Davidson’s Safest Choice also targets grocery stores with misleading advertising in a trade magazine, *Progressive Grocer*. The company’s magazine advertisements for all of its Safest Choice eggs, as well as the egg carton displayed as part of the story, include a logo of a traditional red barn surrounded by green fields, with hens with intact beaks roaming on the pastures. See Attachment E. Moreover, a full page advertisement states, in large text, “Not All Eggs Are Created Equal.” *Id.*

For many grocery retailers, who are very familiar with consumer preferences for high-welfare eggs,<sup>84</sup> the implication is that all of Davidson’s Safest Choice

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<sup>82</sup> Post Holdings 2015 Annual Report, *supra* note 50, at 3.

<sup>83</sup> See *supra* notes 56-64 and accompanying text.

<sup>84</sup> See *Talking with . . . Matthew Prescott*, PROGRESSIVE GROCER at 36 (Apr. 2016), at <http://magazine.progressivegrocer.com/i/663409-apr-2016/37> (collecting announcements of grocers regarding customer interest in improved animal welfare in egg production, and a

“unequal” eggs come from hens with the space to roam bucolic pastures, with access to natural sunlight, grass, and fresh air. But this is not the case. All of the company’s “All-Natural” eggs come from hens living in battery cages—conditions far worse than what the magazine advertisement imagery represents.

**C. Lack of Market Restraints on Deception of Production Methods and Conditions.**

The Commission has stated that where a product or service is easily evaluated by consumers, the likelihood of deception is low because sellers would want to encourage repeat business.<sup>85</sup> Here, in contrast, the method of producing eggs, rather than the final product of the egg itself, is the subject of controversy, and the method of production is nearly impossible for consumers to directly evaluate. Thus, in order to take advantage of consumer preferences for a method of production that consumers cannot determine on their own, and to ensure repeat purchasers, an egg seller is likely to be *more* deceptive about its manufacturing methods.<sup>86</sup>

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statement from the Food Marketing Institute that “Shopper interest in animal welfare has been consistently growing,” and “shoppers want food retailers to prioritize animal welfare”).

<sup>85</sup> FTC, *Policy Statement on Deception*, *supra* note 2, at 5.

<sup>86</sup> See, e.g., Muris, Chairman, FTC, Aspen Summit: Cyberspace and the American Dream, Remarks at the Progress & Freedom Found., 2003 WL 21979851, at \*3 (Aug. 19, 2003) (“Sometimes robust competition alone will not punish or deter seller dishonesty or renegeing. For products called ‘credence goods,’ consumers cannot readily use their own experiences to assess whether the seller’s quality claims are true. Typical consumers know whether a food product ‘tastes great;’ they cannot judge whether consuming the same product reduces the risk of cancer or whether the cost of a car repair included items not necessary to restore the vehicle to its full capacity. . . . For credence goods, the market may not identify and discipline a deceptive seller because the product’s qualities are so difficult to measure. Moreover, a product market with special attributes - consumers cannot determine quality before purchase, higher quality products cost more to produce than lower quality products, and firms cannot credibly guarantee quality - may become a ‘lemons market’ in which only low-quality products are sold”); Azcuenaga, Commissioner, FTC, Advertising Regulation and the Free Market, Remarks at the Int’l Cong. of Adver. & Free Market, 1995 WL 307748, at \*8 (May 11, 1995) (“Because of their lack of susceptibility to consumer assessment, [credence goods] are subject to more intense scrutiny by the FTC”).



Just as, for example, a company that produces apparel under sweatshop conditions would want to hide its method of production from its customers, so too does Davidson's Safest Choice have strong incentives to cover up the actual conditions under which its laying hens are kept. In neither case would the consumer be able to examine the production process by examining just the product purchased. The sweatshop company, then, would have strong incentives, were it able to get away with it, to disseminate advertisements featuring a state-of-the-art facility with "happy" workers in lush surroundings in order to hide its darker reality and avoid dissuading consumers from repeat purchases. Similarly, the reality of caged laying hens is one of intensive confinement, unnatural surroundings and a lifetime of cruelty by commission and omission. And so there are strong incentives for egg producers and sellers such as Davidson's Safest Choice to mislead consumers about these conditions in order to prevent repeat purchasers from being dissuaded.

There are virtually no market restraints on the likelihood of deception in this instance because consumers are unable to tell upon receiving and consuming the product that they have been deceived. Production practices are not readily apparent in the final product. The result is that repeat purchasers may continue to be deceived if the advertisements on Davidson's Safest Choice packaging continue.


Davidson's Safest Choice's questionable choice to remain silent about the miserable lives of caged laying hens that it uses for egg production is one thing, but its affirmative and unqualified misrepresentations about the conditions of the hens is something else entirely. It is unethical, deceptive, and unlawful.

**RELIEF REQUESTED**

The actions described above constitute unlawful conduct, unfair methods of competition, and unfair and deceptive practices under the FTC Act, 15 U.S.C. § 41 *et seq.* Accordingly, HSUS respectfully requests that the Commission investigate the issues discussed above and take appropriate action to enjoin Davidson's Safest Choice from continuing to issue misleading claims pertaining to animal welfare, public health, and food safety.

Simply removing the silhouettes of the hens on the package will not cure the deception. The open, verdant pasture and the red barn, even absent the misleading depictions of hens, would still materially mislead consumers about the conditions under which Davidson's Safest Choice eggs are produced. The company has no reason to use the red barn and pasture imagery but for the imagery's tendency to mislead buyers. If the company aims to provide consumers with pleasant packaging imagery, it could use images of Yosemite, the Grand Canyon, or innumerable other options which do not foreseeably create the false impression of a farm that looks and operates nothing like Davidson's Safest Choice egg production facilities.

Respectfully submitted, Oct. 14, 2016,



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